

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1288

To be argued by
NATHANIEL H. AKERMAN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 77-1288

UNITED STATES OF AMERICA,

—v.—

LUIS BUSTAMONTE,

Defendant-Appellant.

*B
P/S
Appellee,*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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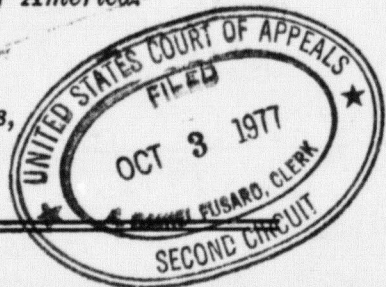




TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
A. The Government's Case	2
B. The Defendant's Case	6
ARGUMENT:	
POINT I—Judge Gagliardi Did Not Abuse His Discretion By Admitting Into Evidence The Transcripts Of The Two Tape Recorded Conversations Of Bustamonte And Garcia	8
A. Facts	8
B. The Transcripts Were Admissible	10
POINT II—The Evidence Of Bustamonte's Membership In The Conspiracy Was More Than Sufficient	13
CONCLUSION	16

TABLE OF CASES

<i>Guevara v. United States</i> , 242 F.2d 745 (5th Cir. 1957)	14
<i>United States v. Accardi</i> , 342 F.2d 697 (2d Cir. 1965)	15
<i>United States v. Calabro</i> , 449 F.2d 885 (2d Cir. 1971), <i>cert. denied</i> , 405 U.S. 928 (1972)	16
<i>United States v. Cirillo</i> , 499 F.2d 872 (2d Cir.), <i>cert. denied</i> , 419 U.S. 1056 (1974)	15
<i>United States v. Ferg</i> , 504 F.2d 914 (5th Cir. 1974)	14

	PAGE
<i>United States v. Fuentes</i> , Dkt. No. 77-1083, Slip Op. 5883 (2d Cir. Sept. 14, 1977)	13
<i>United States v. Glasser</i> , 443 F.2d 994 (2d Cir.), cert. denied, 404 U.S. 854 (1971)	13
<i>United States v. Hysohion</i> , 448 F.2d 343 (2d Cir. 1971)	14
<i>United States v. Johnson</i> , 513 F.2d 819 (2d Cir. 1975)	14
<i>United States v. Joyce</i> , 542 F.2d 158 (2d Cir. 1976), cert. denied, — U.S. — ()	15
<i>United States v. Manfredi</i> , 488 F.2d 588 (2d Cir. 1973), cert. denied, 417 U.S. 936 (1974) ...	15, 16
<i>United States v. Marrapese</i> , 486 F.2d 918 (2d Cir. 1973), cert. denied, 415 U.S. 994 (1974)	16
<i>United States v. Maxwell</i> , 383 F.2d 437 (2d Cir. 1967)	11, 12, 13
<i>United States v. Mejias</i> , 552 F.2d 435 (2d Cir.), cert. denied, — U.S. — (1977)	16
<i>United States v. Pui Kan Lam</i> , 483 F.2d 1202 (2d Cir. 1973), cert. denied, 415 U.S. 984 (1974) ..	16
<i>United States v. Rizzuto</i> , 504 F.2d 419 (2d Cir. 1974)	16
<i>United States v. Sisca</i> , 503 F.2d 1337 (2d Cir.), cert. denied, 419 U.S. 1008 (1974)	15
<i>United States v. Valdes</i> , 417 F.2d 335 (2d Cir. 1969), cert. denied, 399 U.S. 912 (1970)	15
<i>United States v. Wiley</i> , 519 F.2d 1348 (2d Cir. 1975), cert. denied, 423 U.S. 1058 (1976)	13

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UNITED STATES OF AMERICA,

Appellee,

—v.—

LUIS BUSTAMONTE,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Luis Bustamonte appeals from a judgment of conviction entered on May 12, 1977, in the United States District Court for the Southern District of New York, after a three-day trial before the Honorable Lee P. Gagliardi, and a jury.

Indictment 73 Cr. 953, filed on October 11, 1973, charged Bustamonte, Jacinto Moreira and Dora Munoz with two counts of violating the federal narcotics laws. Count One charged them with conspiring to violate the federal narcotics laws between September 1, 1973, and October 11, 1973, in violation of Title 21, United States Code, Section 846. Count Two charged them with distributing and possessing with the intent to distribute approximately 489.5 grams of cocaine in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.

On November 19, 1973, Munoz pled guilty to count one of the Indictment, and on November 26, 1973, Moreira pled guilty to that same count. Bustamonte failed to appear in court on November 26, 1973, the date designated for his trial, and a bench warrant was issued for his arrest.

Indictment 77 Cr. 319, filed on April 27, 1977, charged Bustamonte with one count of bail jumping in violation of Title 18, United States Code, Section 3150. On April 29, 1973, Indictments 73 Cr. 953 and 77 Cr. 319 were consolidated for trial.

Trial commenced on May 9, 1977. On May 12, 1977, the jury found the defendant guilty on the conspiracy and bail jumping counts and acquitted him on the distribution and possession count.

On June 16, 1977, Judge Gagliardi sentenced Bustamonte to two and one-half years of imprisonment on the conspiracy count, to be followed by three years of special parole and two years of imprisonment on the bail jumping count, of which six months is to run consecutively to the prison term on the conspiracy count and the balance is to run concurrently.

Statement of Facts

A. The Government's Case

During the summer of 1973, Luis Bustamonte and his friend, Jacinto Moreira, whose nickname was "Rocky", imported and sold cocaine on two occasions. The cocaine for their first sale was brought into the United States on a ship from Ecuador. Rocky took the cocaine off the ship and gave it to Bustamonte. Rocky subsequently received the proceeds from the sale of that cocaine from

8

Dora Munoz and Pepe at 2340 Valentine Avenue in the Bronx. Pepe paid Rocky \$8,000 for the cocaine, \$3,000 of which Rocky kept for himself. (Tr. 76-81, 122).*

In September of 1973, Rocky received another shipment of cocaine from a man who worked on board the ship "Alaque". The cocaine, wrapped in four plastic bags, weighed 40 ounces and was stored in the clothes hamper in Rocky's home. Within several days after receiving the cocaine, Rocky was visited at his home by Bustamonte and Raulio. All three individuals met in Rocky's kitchen for the purposes of weighing the cocaine and testing its quality. Rocky commented that the quality of the cocaine was not very good. After this meeting in the kitchen, Rocky repeated his comment on the quality of the cocaine to his girlfriend, Ana Garcia. Rocky also told her that he was going to give the cocaine to Bustamonte, who would be responsible for selling it. In fact, on October 1, 1973, Rocky told Garcia that he was going to visit Bustamonte for the purpose of giving him the cocaine. (Tr. 82-87).

On October 2, 1973, at approximately 2:00 p.m. Rocky, Garcia, and Nancy Ortiz, a friend of Garcia's, drove to Kennedy Airport where Rocky was scheduled to board a plane to Ecuador. Before they arrived at the airport terminal, they were stopped and arrested by Special Agents of the Drug Enforcement Administration. Shortly after the arrest, Garcia agreed to cooperate with the Agents and told them everything she knew about Rocky's cocaine business, including her knowledge about Bustamonte's role in the business. The Agents asked Garcia to telephone Bustamonte from the office of the Drug Enforcement Administration. Agent Sullivan dialed

* Citations designated "Tr." refer to pages in the official transcript, "GX" refer to a Government's Exhibit, and "Br." refer to the appellant's brief.

Bustamonte's telephone number, and the Agents told Garcia what to say. Garcia placed two such calls.* (Tr. 87-88, 151, 156-59, 165-66).

The first telephone call was placed at approximately 5:00 P.M. During the course of her conversation with Bustamonte, Garcia told him that Rocky met a man at the airport who wanted to buy all of the cocaine. Bustamonte told her that the cocaine, which was referred to by the code words "shirts" and "trousers", was at Pepe's house on Valentine Avenue and that some of it had been sold. Bustamonte stated that he would call Pepe's house to ascertain whether any of the cocaine was available for Garcia's customer. At approximately 6:00 p.m. Garcia called back Bustamonte and asked him if he had called Pepe's and Dora's house. Bustamonte responded that he had called, that the cocaine was at Pepe's house, that some of the cocaine had been sold, that Dora had the proceeds from that sale, and that he was going to pick up the proceeds possibly that evening. (Tr. 88-90, 157-59; GX 2, GX 3).

After the second telephone call, the Agents drove Garcia to 2340 Valentine Avenue in the Bronx where Dora Munoz and Pepe lived. At approximately 8:45 p.m., Garcia visited Apartment 3A and introduced herself to Dora Munoz as Rocky's wife. Garcia told Munoz that she (Garcia) had someone who was interested in buying that portion of the cocaine which had not been sold. Garcia asked Munoz if she could examine the cocaine. Munoz retrieved the cocaine from a laundry hamper and weighed it. The cocaine weighed approximately sixteen ounces. (Tr. 91-92, 122-23, 150-60).

* As will be discussed more fully in Point I, *infra*, transcripts of the tape recordings of their conversations were admitted into evidence.

Garcia was in the apartment approximately twenty minutes and then left to meet the Agents at their car. At the Agents' direction Garcia returned to Munoz' apartment and told Munoz . . . she decided to wait for Bustamonte at the apartment. Munoz then telephoned Bustamonte and spoke with him. Dora handed the telephone to Garcia, and Garcia talked to Bustamonte, who said he would not be visiting Munoz' apartment that evening. Upon the completion of that conversation, Garcia left the apartment, and the Agents entered and arrested Munoz. A search of the apartment uncovered \$9,500 in cash and 17 ounces of cocaine, which Munoz claimed belonged to Bustamonte. (Tr. 92-94, 160-63, 178-79; GX 1, GX 4).

At approximately 11:00 p.m. that same evening, Bustamonte was arrested at his residence at 200 West 89th Street, in Manhattan. On October 4, 1973, Bustamonte was released on bail on a personal recognizance bond in the amount of \$5,000 secured by \$500 cash. The bond was signed by Bustamonte and cosigned by his wife Carmen Bustamonte. Bustamonte's trial was scheduled for November 26, 1973, but Mr. Bustamonte failed to appear. (Tr. 163, 265; GX 8).

On March 19, 1977, at approximately 11:30 a.m. Bustamonte was interviewed in the United States Attorney's Office. After being advised of his constitutional rights, Bustamonte stated that he had previously been arrested by Agents of the Drug Enforcement Administration because he had spoken to a lady on the telephone, that he had been released on bail on a personal recognizance bond secured by \$1,500, that he had jumped bail and had returned to his native country in Ecuador. (Tr. 210-13).

On May 3, 1977, Bustamonte was interviewed at the Metropolitan Correctional Center in New York City by

Thomas Leupp, a criminal investigator with the Department of Immigration and Naturalization. Bustamonte was advised of his rights and then signed a statement that in October 1973, he had been arrested by federal agents and charged with conspiracy, that he was released from custody and that he then left the United States at the end of October, because he "was afraid . . . [he] was going to spend a lot of time in jail." Bustamonte also stated that since he left the United States in October of 1973, he had re-entered the United States five times. On two of those occasions he said that he had obtained tourist visas. On the first visa application he said that he had stated that he had never previously been in the United States. Bustamonte also stated that he did not use his residence card because he was afraid that Immigration officials would check his name against records which would reveal there was a warrant outstanding for his arrest. (Tr. 248-56, GX 7, GX 9).

B. The Defendant's Case

The thrust of the defendant's case was that the use of the word "shirts" in his conversation with Garcia was not a code word for cocaine but an actual reference to articles of clothing that he was in the business of selling. Carlos Bustamonte, the defendant's brother, testified that he was employed by the Capital Mercury Shirt Corporation, that since the end of 1970 he had been giving the defendant damaged shirts and samples, and that the day before the defendant's arrest on October 2, 1973, he had given Bustamonte between fifty and seventy such shirts. On cross-examination, the brother testified that these shirts sold for four dollars in retail stores. (Tr. 346-53).

Carmen Bustamonte, the defendant's wife, testified that she and her husband sold the shirts that she received from Carlos Bustamonte, and that on the night of her

husband's arrest there were boxes of shirts in their apartment. On cross-examination, she could not recall how many shirts she had sold or how much money she had made from the sale of the shirts. She also testified that neither she nor her husband had ever sold trousers. (Tr. 320-30).

In addition to the defendant's wife and brother, several other witnesses claimed that the defendant and his wife sold shirts. Frederick Begell, a former employer of Mrs. Bustamonte, testified that sometime between 1970 and 1971 Mrs. Bustamonte had offered to sell him and his father some shirts she had in a shopping bag. (Tr. 310-12).

Gonzalo Serrano, a neighbor of the defendant's, testified that in 1972 and 1973 he bought shirts from the defendant and his wife and saw a friend buy shirts from the defendant. On cross-examination, Serrano testified that he bought these shirts two or three times in 1971, that he never paid more than \$2 or \$3 a shirt, and that his friend bought the shirts in 1971 or 1972. On cross-examination Serrano also testified that he never bought trousers from Bustamonte. On redirect Serrano changed his testimony stating that he bought the shirts in 1973. (Tr. 354-62).

Luis Zurita, a proprietor of a travel agency patronized by the defendant, testified that in 1972 and 1973 Bustamonte sold shirts to people in his travel agency. On cross-examination Zurita could not recall the full names of any one who bought these shirts. (Tr. 315, 377-78).

ARGUMENT

POINT I

Judge Gagliardi Did Not Abuse His Discretion By Admitting Into Evidence The Transcripts Of The Two Tape Recorded Conversations Of Bustamonte And Garcia.

Bustamonte asserts that Judge Gagliardi committed reversible error by admitting into evidence the transcripts of the two tape recorded conversations of Bustamonte and Garcia. This claim is totally without merit.

A. Facts

As set forth above, the Drug Enforcement Agents requested Ana Garcia, after her arrest on October 2, 1973, to place two telephone calls to Bustamonte. Agent Sullivan dialed Bustamonte's telephone number for each of the calls and tape recorded both of the conversations between Bustamonte and Garcia. Agent Sullivan maintained custody of the tapes until November 2, 1973, when he turned them over to Assistant United States Attorney Daniel Pykett. Because both conversations were in Spanish, on November 7 and 8, 1973, Pykett gave the tapes to Lybia Clancy, a Spanish interpreter, for her to interpret from Spanish to English. Clancy put the tapes in a transcriber, listened to them thoroughly, and then went back to the beginning of the tape and wrote out in longhand an English translation, which she again compared to the tape. From her handwritten translations she typed the two English transcripts, compared her handwritten translations with the transcripts and then destroyed her handwritten notes. Subsequently, Clancy hand-delivered the tapes and the transcripts to Mr. Pykett. (Tr. 8S-90, 158-59, 227-29, 237-38, 266-73, 308).

After Bustamonte's arrest on March 18, 1977, a thorough search for the tapes was conducted by the United States Attorney's Office for the Southern District of New York. Joseph Vitale, the Chief Administrative Officer of the United States Attorney's Office, conducted two searches of the evidence safe located on the fourth floor of the United States Attorney's Office, once by himself and the second time accompanied by Assistant United States Attorney Nathaniel H. Akerman, who prosecuted this case. Assistant United States Attorney Rhea Neugarten searched the safe maintained by the Narcotics Unit of the United States Attorney's Office on the ninth floor. Neither the tapes, nor any record of the tapes, were found in either safe. Additionally, both Akerman and Neugarten personally questioned Daniel Pykett about his knowledge of the tapes, but he was unable to provide any information concerning its whereabouts. (Tr. 269; Affidavit of Assistant United States Attorney Nathaniel H. Akerman, dated May 6, 1977).

Despite the fact that the records of the Drug Enforcement Administration show that the tape recordings were turned over to the United States Attorney's Office, Special Agent Edward Magnuson of the Drug Enforcement Administration, one of the agents who participated in Bustamonte's arrest, also conducted a thorough search of that agency for the tapes. Magnuson searched the non-narcotic evidence vault on the 19th floor of the Drug Enforcement Administration's Headquarters at 555 West 57th Street, New York, New York, the safe maintained by his administrative section, Group 22, and his desk. Agent Sullivan also searched his desk. None of these efforts succeeded in locating the tape. (Tr. 214, Affidavit of Assistant United States Attorney Nathaniel H. Akerman, dated May 6, 1977).

At trial, Garcia identified the two transcripts of the tapes in question as accurately reflecting her two telephone conversations with Bustamonte on October 2, 1973; Clancy identified the two transcripts as the transcripts she prepared from the Spanish tapes given to her by Pykett on November 7, and 8, 1973; and Pykett identified the transcripts as the ones he received from Clancy for the Bustamonte-Garcia conversations. (Tr. 94-95, 227-29, 234-35, 267-68, 308).

At the conclusion of the trial Judge Gagliardi specifically found that the Government did not lose or destroy the tapes in bad faith, and the transcripts were received in evidence. (Tr. 281-82, 309).

B. The Transcripts Were Admissible

The transcripts were admissible into evidence under Rule 1004 of the Federal Rules of Evidence. Rule 1004, in pertinent part, provides that:

The original is not required, and other evidence of the contents of a . . . recording . . . is admissible if—(1) Originals lost are destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith . . .

In this case Judge Gagliardi properly found that the Government did not lose or destroy the tapes in bad faith. The evidence at trial showed that the tapes were simply lost inadvertently, and that the Government made every possible effort to locate the tapes in March 1977 after the defendant had been re-apprehended. At no point during the cross-examination of the parties who had custody over the tapes did counsel for the defendant

elicit any testimony that even hinted at bad faith on the part of the Government.*

The question of whether the transcripts were trustworthy reproductions of the conversations recorded on the tapes was an issue for the jury. Rule 1008(c) F.R. Evid. In this case the jury could have clearly found that there was ample evidence of trustworthiness. There was proof that the tape recordings of the Garcia-Bustamonte conversations were turned over to Assistant United States Attorney Pykett by Agent Sullivan, that Assistant United States Attorney Pykett gave the tapes to Clancy for translations, that Clancy followed a careful procedure in translating the tapes from Spanish to English and then prepared two accurate transcripts, and that Clancy returned the tapes and the transcripts to Pykett after she had completed her translation.** Moreover, and indeed, most significantly, Garcia testified that both transcripts were accurate reflections of her two telephone conversations with Bustamonte.

This Court's decision in *United States v. Maxwell*, 383 F.2d 437 (2d Cir. 1967) is almost identical to the case at bar. In that case the Agent made a partial transcript of a taped conversation from a re-recording of the original

* The obvious underlying cause for the loss, of course, was the three-and-one-half year delay during Bustamonte's absence, during which the Assistant trying the case left the office, and the office itself physically moved from the Courthouse to its annex. While the loss was regrettable and one for which we take ultimate responsibility, the delay itself was caused solely by Bustamonte's wilful choice to absent himself in violation of his bail agreement.

** The fact that Clancy testified that she used "sphinx" brand paper when she had actually used "esquire" brand paper and that she had a 10% doubt as to whether she translated the tapes, simply goes to the weight the jury would give her testimony, not to the admissibility of the transcripts.

tape by listening to the re-recording through earphones and dictating what he heard to a shorthand stenographer. The shorthand notes were typed and the agent compared the transcript to the tape, satisfying himself that the transcript was accurate. Approximately ten minutes of the forty-five minute taped conversation were transcribed. Subsequently the tapes were erased because the agent believed that after a first trial they would not be needed for a retrial.

On the question of bad faith this Court in *Maxwell* held that "although we regret the government's conduct in not supervising their handling more carefully and allowing the tapes to be erased while charges against Maxwell were outstanding, it was within Judge Tenney's discretion to admit" the tapes because they "were not erased to prevent their production for trial . . ." *United States v. Maxwell, supra*, 383 F.2d at 443. Similarly, in this case there was absolutely no evidence that the Government lost the tapes to prevent their production at Bustamonte's trial.

In rejecting the defendants' claim that the transcripts were not trustworthy this Court held:

The deletion of the inaudible, irrelevant and repetitive portions of a tape does not render it inadmissible . . .

* * *

Here, although the transcript was typed from shorthand notes dictated by Murphy [the Agent] while listening to the re-recording and was thus susceptible to many inaccuracies, Murphy testified that the transcript accurately represented the re-recording which itself is not challenged. Hence, Judge Tenney was warranted in finding that untrustworthiness had not been shown . . . *United States v. Maxwell, supra*, 383 F.2d at 442.

The trustworthiness of the transcripts in the instant case is even stronger than in *Maxwell*. Here, unlike *Maxwell*, the transcripts were made from the original, not re-recordings and the entire tapes, not portions of them, were transcribed. In short, Judge Gagliardi acted completely within his discretion in admitting the transcripts. See generally *United States v. Fuentes*, Dkt. No. 77-1083, slip op. 5883, 5888-93 (2d Cir., Sept. 14, 1977).*

POINT II

The Evidence Of Bustamonte's Membership In The Conspiracy Was More Than Sufficient.

Bustamonte contends that Judge Gagliardi erred in not granting his motions for a judgment of acquittal on the ground that "there was no evidence in the record as to an unlawful agreement." (Br. 30). This claim is totally frivolous.

Judge Gagliardi committed no error in denying Bustamonte's motions for a judgment of acquittal since, upon the evidence taken as a whole, "a reasonable mind might fairly conclude that the defendant was guilty beyond a reasonable doubt." *United States v. Wiley*, 519 F.2d 1348, 1349 (2d Cir. 1975), *cert. denied*, 423 U.S. 1058 (1976); *United States v. Glasser*, 443 F.2d 994 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971).

Here, the jury was reasonably entitled to find that Bustamonte and Rocky transacted two cocaine sales in the summer of 1973, that Rocky gave the first shipment

* Finally, even if the transcripts were erroneously admitted into evidence, their admission was harmless error since Garcia testified to the substance of both taped conversations. *United States v. Maxwell*, *supra*, 383 F.2d at 443.

of cocaine to Bustamonte and that in the second transaction Bustamonte met with Rocky and Aurelio at Rocky's home for the purpose of weighing and testing the cocaine. This meeting in Rocky's home was not a situation comparable to the facts in the two cases cited by the defendant, *Guevara v. United States*, 242 F.2d 745 (5th Cir. 1957) and *United States v. Ferg*, 504 F.2d 914 (5th Cir. 1974) where the courts reversed because the defendant was merely present where drugs were found concealed. See also *United States v. Hysohion*, 448 F.2d 343, 347 (2d Cir. 1971); *United States v. Johnson*, 513 F.2d 819 (2d Cir. 1975). Here, Bustamonte was actually participating in the weighing and testing of the cocaine.

After this meeting at Rocky's home, Rocky told Garcia that he was going to give the cocaine to Bustamonte and that Bustamonte would sell it. Although Bustamonte later told Garcia over the telephone that Rocky did not give him the cocaine, it is patently obvious from Bustamonte's conversations with Garcia that he had agreed with Rocky to sell the cocaine. During the telephone conversations with Garcia, Bustamonte showed himself to be not only knowledgeable about the cocaine in that he knew it was at Pepe's house on Valentine Avenue and that some, if not all, of it had been sold, but he made it clear that it was his job to pick up the proceeds from the sale of the cocaine at Pepe's house.*

Moreover, the jury certainly could have inferred that the use of the words "shirts" and "trousers" in the telephone conversations between Garcia and Bustamonte were

* In fact, the Agents took Garcia to Pepe's house on Valentine Avenue expecting that Bustamonte would show up for the money. It was only during Garcia's telephone conversation with Bustamonte from Pepe's apartment that Bustamonte said he would not go to Pepe's apartment that evening.

code words for cocaine. In that connection Garcia testified that she was using "shirts" as a code word for cocaine and that she never understood Bustamonte to be in the business of selling actual shirts (Tr. 89, 114-15), and Agent Sullivan testified that the words "shirts" and "trousers" are common code words used by cocaine traffickers. (Tr. 171-72). Indeed, this Court has unequivocally held that guarded language and narcotics code words including words denoting articles of clothing such as "shirts" and "dresses" are evidence of guilt. *United States v. Sisca*, 503 F.2d 1337, 1343 (2d Cir.), *cert. denied*, 419 U.S. 1008 (1974); *United States v. Cirillo*, 499 F.2d 872, 888 (2d Cir.), *cert. denied*, 419 U.S. 1056 (1974); *United States v. Manfredi*, 488 F.2d 588, 597 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974).

Finally, the jury could have inferred Bustamonte's guilt on the conspiracy charge from his flight from the United States to Ecuador. It is an ironclad principle of law that "flight from prosecution" . . . [is] . . . "evidence from which an inference of [the defendant's] consciousness of guilt . . . [can] . . . be drawn." *United States v. Accardi*, 342 F.2d 697, 700 (2d Cir. 1965); *cf. United States v. Valdes*, 417 F.2d 335, 339, n.2 (2d Cir. 1969), *cert. denied*, 399 U.S. 912 (1970). The jury was particularly justified in drawing this inference since Bustamonte admitted that he left the country because he was fearful of spending a lot of time in jail.

In conclusion, the evidence was more than sufficient to permit the jury to draw the reasonable inference that Bustamonte "knew about the enterprise and intended to participate in it or make it succeed." *United States v. Cirillo*, *supra*, 499 F.2d at 883; *cf. United States v. Joyce*, 542 F.2d 158, 161 n.10 (2d Cir. 1976), *cert. denied*, — U.S. — (). Indeed, the evidence in this

case is much more overpowering than other narcotics cases in which this Court has held the evidence to be sufficient. *United States v. Rizzuto*, 504 F.2d 419, 420 (2d Cir. 1974); *United States v. Pui Kan Lam*, 483 F.2d 1202, 1208 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974); *United States v. Manfredi*, *supra*, 488 F.2d at 596; *United States v. Calabro*, 449 F.2d 885, 889-90 (2d Cir. 1971), *cert. denied*, 405 U.S. 928 (1972). Indeed, since Bustamonte can hardly dispute the evidence that *someone* was dealing in narcotics, only "slight" evidence was necessary to establish his participation in the conspiracy. *United States v. Marrapese*, 486 F.2d 918 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974); see generally, *United States v. Mejias*, 552 F.2d 435 (2d Cir.), *cert. denied*, — U.S. — (1977).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Nathaniel H. Akerman being duly sworn deposes
and says that he is employed in the office of the United States
Attorney for the Southern District of New York.

That on the **3rd** day of **October, 1977**
he served a copy of the within brief by placing the same in a
properly postpaid franked envelope addressed:

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And deponent further says that he sealed the said envelope and
placed the same in the mail box for mailing at the United States
Courthouse Annex, 1 St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Nathaniel H. Akerman

Sworn to before me this

3rd day of **October, 1977**

Alma Hanson

ALMA HANSON
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